In the

United States Circuit Court of Appeals

for the

Ninth Circuit

No. 9924

B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington,

Appellants,

vs.

Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE United STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

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Attorney General of the State of Washington,
T. H. Little,
Assistant Attorney General of the State of Washington,
Attorneys for Appellants.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

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APPELLANTS' BRIEF

STATEMENT OF PLEADINGS AND BASIS OF JURISDICTION

The Bill of Complaint was filed in the District Court of the United States for the Western District of Washington by the Makah Indian Tribe, a corporation, and

certain Makah Indians individually and as members of the Council of the Makah Indian Tribe, against B. T. McCauley, Director of Game of the State of Washington; B. M. Brennan, Director of Fisheries of the State of Washington; E. M. Benn, Inspector of the Department of Fisheries of the State of Washington; and Guy Burnham, Game Protector of the State of Washington, praying for a decree of the court as follows:

"(1) Establishing that the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Tribe of Makah Indians, to which their rights and privileges of fishing were reserved by the treaty with the Makah made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

"(2) Establishing the rights and privileges of these plaintiffs, and each of them and of all of the members of the Makah Tribe of (8) Indians to fish in their above-described usual fishing place by reason of their priority in time and interest and by reason of their treaty rights and privileges.

"(3) Permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner whatsoever interfering with or depriving the plaintiffs herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described."

Defendants filed a Special Appearance and Motion to Dismiss for want of jurisdiction over the defendants, or of the subject matter of the action.

The District Court overruled defendants' objection to the jurisdiction of the court and entered a preliminary injunction restraining the state officers from enforcing the state fish and game laws on the Hoko River.

Subsequently, defendants filed a Motion to Dismiss under Rule 12 (b), Rules of Civil Procedure, contending that a District Court lacks jurisdiction to grant the relief prayed for, namely, an interlocutory and permanent injunction, under Section 266 of the Judicial Code (28 U. S. C. A., sec. 380), or in the alternative for Judgment on the Pleadings under Rule 12 (c), Rules of Civil Procedure. The District Judge convened a three-judge court which determined the case was not a proper one for a statutory court in that the pleadings did not bring forward nor present the question of constitutionality of a statute of the State of Washington. No appeal was taken from the order entered by such court.

The parties stipulated that the motion for Judgment on the Pleadings might be determined by a single district judge if such statutory court found that it lacked jurisdiction, and the appeal herein embraces (A) defendants' unsuccessful challenge to the jurisdiction of the District Court, and (B) the District Court's denial of defendants' motion for Judgment on the Pleadings.

While the jurisdiction of the District Court in this suit is challenged by the state, if this appellate tribunal sustains the lower court on this point, jurisdiction will rest on the provisions of Title 28, U. S. C. A., sec. 41 (1), vesting the District Court with jurisdictoin over questions "arising under the Constitution and laws of the United States or treaties made under their authority."

STATEMENT OF CASE

The Makah Indian Tribe and the individual members thereof brought this injunction suit to establish that the Hoko River in Clallam County, Washington, located some twelve or fifteen miles from the Makah Reservation, is a "usual and accustomed fishing ground" of the Makah Tribe, and that under the Stevens Treaty of January 31, 1855 (12 Stat. 939) the members of the tribe are entitled to fish without interference in any manner whatsoever by the State of Washington, acting through its agents, the only medium by which its authority can be exercised.

Defendants by their motion for Judgment on the Pleadings, which is tantamount to a demurrer, for the purpose of raising the issue of law herein presented, admit that

(1) The plaintiff, Makah Indian Tribe, is a corporation and that it is a confederated tribe. That the individual plaintiffs are members of the Makah Tribal Council.

(2) That the defendants are law enforcement officials of the State of Washington. That B. T. McCauley is the director of the Department of Game and Game Fish of the State of Washington; that B. M. Brennan is the director of the Department of Fisheries of the State of Washington; that E. M. Benn is a duly authorized and qualified inspector of the Department of Fisheries; and that Guy Burnham is a duly authorized and qualified game protector of the Department of Game and Game Fish of the State of Washington.

(3) That a treaty was entered into by the Makah Tribe of Indians and the United States of America on

January 31, 1855, at Neah Bay; that the treaty was proclaimed by the President of the United States as the law of the land on April 18, 1859, and that the treaty was ratified by the Senate of the United States on March 8, 1859.

(4) That by the terms of the Indian Treaty, there was reserved for the permanent use and occupation of the Makah Tribe the tract of land more particularly described in Articles I and II of the Makah Tribe (Exhibit A), popularly known as the Makah Indian Reservation.

(5) That the Hoko River, in Clallam County, located approximately 12 miles from the boundary of the Makah Indian Reservation, is a usual and accustomed fishing ground and station for the Makah Indians off the reservation, and that the Makah Indians take fish as a means of livelihood by various types of modern fishing gear as set forth in the complaint, namely: by use of seines, set nets, dip nets or other fishing gear.

Defendants admit the foregoing pertinent facts and contend as a matter of law that the treaty secured to the Makah Indians only an equality of fishing rights and privileges, coequal with the rights of the citizens, and not exclusive rights at any particular place off the reservation. The guarantee is of rights in common with all citizens of the United States.

QUESTIONS PRESENTED

Appellants' assignments of error, reduced to their essence, present a single, sharply defined issue, aside from the question of jurisdiction.

Article IV of the Makah Treaty provides in part:

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * "

Appellees contends that this provision of the treaty vested in members of the Makah Tribe a perpetual right of fishing at usual and accustomed grounds and stations off the Makah Reservation, without interference in any manner whatsoever by the State of Washington.

Appellants contend that the "off the reservation" right to fish secured by the treaty is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to regulate the taking of fish from the waters within its jurisdiction for the benefit of all its citizens.

SUMMARY OF ARGUMENT

A

(Jurisdiction of District Court)

The District Court was without jurisdiction over the defendants or of the subject matter of the action, in that

(1) The action in equity is one against public officers of the State of Washington as such, hence in truth and in fact an action against the State of Washington;

(2) This is an action against the state by Indians, who by Acts of Congress have been made citizens thereof, hence the United States District Court has no jurisdiction;

(3) Plaintiffs although citizens of the State of Washington are suing on behalf of the tribe, as wards of the Federal Government, and as such have no legal capacity to sue due to their disability, and any action on their behalf must be brought by the United States Government, through the United States District Attorney.

B

The district court's denial of defendants' motion for judgment on the pleadings is contrary to law in that the court's action is repugnant to the following established principles which are involved herein.

I.

A state's police power is one of the highest attributes of sovereignty, and that power has never been delegated by the several states to the Federal government.

II.

The police power can neither be abdicated nor bargained away, and is inalienable even by express grant.

III.

Upon admission into the Union, a state becomes possessed of all the rights and powers coequal with her sister jurisdictions.

IV.

The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. The Stevens Treaty of 1855 did not curtail or abridge the police power of the future State of Washington, and upon its admission into the Union, the state became endowed with full police powers.

V.

The protection of fish and the regulation of fishing is for the common benefit of the people, and legislation directed to that end is a valid and proper exercise of the police power. Over fish found within its water, and over wild game, the state has supreme control.

VI.

Fish and game laws of the State of Washington are regulatory measures and constitute a lawful exercise of the state's police power. It has for its purpose the necessary preservation of the state's commercial and game fisheries, and meets all the requirements that the lawful exercise of police power must be reasonable, nondiscriminatory, and nonarbitrary.

VII.

The fishing places in question are outside the boundaries of the Makah Reservation and within the sole jurisdiction of the State of Washington.

VIII.

The Makah Indian Treaty secured to the members of the federated Makah Tribe a vested easement right of ingress to and egress from their "usual and accustomed grounds and stations" outside the reservation, there to fish "in common with all citizens of the United States"; subject to any valid exercise of the right by the sovereign which is operative on all alike for the best interests of the state's aquatic resources.

IX.

Indian treaties are to be given a liberal construction, but must be considered in the light of current economic conditions prevailing in the development and conservation of our natural resources, having in mind the welfare of all the people.

X.

The Indian, by Act of Congress in 1924, has been made a citizen of the United States and of the state in which he resides. As such, he is entitled to all the rights, privileges and immunities accorded other citizens of the state, and to the equal protection of its laws, and is also subject to its laws.

XI.

Conservation of our fast diminishing natural resources is one of the chief concerns of organized government today. In the discharge of this important respon-

sibility for and on behalf of its people, the State of Washington is acting as much in the interest of the Indian citizen as any other, and its obligation toward him is just as great, for the Indian is now an integral part of its citizenry.

ARGUMENT

A

(Jurisdiction of the District Court)

I. This Action in Equity is One Against Public Officers of the State of Washington as Such, Hence in Truth and in Fact an Action Against the State of Washington.

A suit against officers of a state is a suit against the state itself although not brought against the state by name, where the state is the "real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In re Ayers, 123 U. S. 443, 505;
Reagan v. Farmers Loan, etc. Co., 154 U. S. 362, 38 L. Ed. 1014;
Fitts v. McGhee, 172 U. S. 516, 528, 43 L. Ed. 535;
U. S. v. Clausen, 291 Fed. 231, 238;
State ex rel. Pate v. Johns, 170 Wash. 125.

In the present action, it cannot be denied that the relief sought is against the State of Washington, through the only medium through which it can act, its officers and agents. Plaintiffs here seek immunity from the operation of certain laws. No relief, in truth and in fact, is sought against the defendants as individuals. It is an action to restrain the state from enforcing its fish and game laws with respect to the plaintiffs and any injunctive relief, if granted, could restrain only the individual defendants named. There would be nothing to prevent other agents, county or state, from enforcing the state laws from which the plaintiffs herein seek to escape the operation thereof. This is emphasized by the fact that B. M. Brennan, one of the defendants herein, is no

longer the Director of Fisheries of the State of Washington. Following a change in the state administration, Mr. Brennan was replaced by Mr. Fred J. Foster, who now occupies the position of Director of Fisheries, under gubernatorial appointment. There is no injunction restraining Mr. Foster in his official capacity from enforcing the state fish laws. The very tenor of the prayer for relief in the Bill of Complaint seeks immunity from the state law enforcement officials and those under their immediate supervision. Hence, it is obvious that the plaintiffs desire freedom from control of the state itself in so far as their fishing activities are concerned. Any contention to the contrary is based on pure legal fiction.

II. This is an Action Against the State by Indians, Who by an Act of Congress Have Been Made Citizens Thereof, Hence the United States District Court Has No Jurisdiction.

The principle of law invoked in this contention does not need lengthy elaboration for it is established that a suit in a Federal Court against a state by one of its citizens, the state not having consented to be sued, is unknown and forbidden by law.

Fitts v. McGhee, 172 U. S. 516, 525, 43 L. Ed. 535;
Hans v. Louisiana, 134 U. S. 1, 10, 33 L. Ed. 842;
Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 83 L. Ed. 784.

III. Plaintiffs, Although Citizens of the State of Washington, Are Still Wards of the Federal Government and as Such Have No Legal Capacity to Sue, Due to Their Disability and Any Action in Their Behalf Must Be Brought by the United States Government Through the United States District Attorney.

The Indian occupies a novel role of duel citizenship. By Act of Congress, June 2, 1924 (Title 8, Sec. 3, U. S. C. A.), the Indian became a citizen and as such is entitled to all the immunities and benefits inherent to citizenship. At the same time, he is still a ward of the United States Government and subject to all rules and regulations made for his protection by authority of Congress. As said by Mr. Justice Vandevanter in *United States v. Nice,* 241 U. S. 591, 60 L. Ed. 1192:

"Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris,* the tribal relation may be dissolved and the ntaional guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

Thus, it is recognized that the conferring of citizenship on Indians does not place them beyond the reach of congressional regulations, adopted for their benefit.

United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107;

Tiger v. Western Inv. Co., 221 U. S. 286, 55 L. ed. 738;

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820;

United States v. Nice, supra;

Brader v. James, 246 U. S. 88, 62 L. ed. 591.

The force and effect which the courts give to the rules and regulations adopted by Congress for the supervision of its Indian wards is poignantly stated by Mr. Justice Miller in the case of *United States v. Holliday,* 3 Wall. 407, 18 L. ed. 182:

"In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. * * * This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority. Neither the constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them."

Title 25, Section 175, U. S. C. A., provides as follows:

"In all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity. (Mar. 3, 1893, c. 209, Sec. 1, 27 Stat. 631.)"

Title 25, Section 476, U. S. C. A., further provides.

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by laws when ratified as aforesaid and approved by the Secretary of the Interior shall be re-

vocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior;* to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress." (Italics ours.)

These statutes import the intent of Congress to exercise control over Indian affairs and make it mandatory that actions be brought for and on behalf of its Indian wards through legal representatives of the guardian.

The case of *United States v. Colvard,* 89 Fed. 312, was one in which it was held that the Federal District Court had jurisdiction over a suit in equity filed by the United States to enjoin trespass on Indian lands conveyed to the United States in trust, since the court has express statutory jurisdiction over suits at law and in equity brought by the United States, irrespective of the amount involved, and the United States has both a right and a duty to maintain such suits as may be necessary for the protection of its Indian wards. We quote from the opinion in this case handed down by Circuit Judge Parker:

"Since this is a suit in equity brought by the United States, there would seem to be no question as to the jurisdiction of the court to entertain it, as the District Court is expressly granted jurisdiction of suits at law or in equity brought by the United States, irrespective of the amount involved. 28 U. S. C. A. Sec. 41 (1). It is the right and the duty of the government to maintain such suits as may be necessary for the protection of its Indian wards. *United States v. Wright* (C. C. A. 4th) 53 F. (2d) 300; *United States v. Boyd* (C. C. A. 4th) 83 F. 547; Id. (C. C.) 68 F. 577; *In re Celestine* (D. C.) 114 F. 551, 552; *U. S. v. Winans* (C. C.) 73 F. 72, 75; *United States v. Flournoy Live-Stock & Real-Estate Co.* (C. C.) 71 F. 576, 579; Id. (C. C.) 69 F. 886, 894. And particularly is this true where the United States holds land in trust for the use and benefit of these wards and suit is necessary for the protection of the lands. *United States v. Wright, supra; United States v. Flournoy Live-Stock & Real-Estate Co., supra.*"

Other cases which might be cited as authority for the proposition that the mere granting of citizenship to the Indian does not remove the peculiar relationship of guardian and ward as between the Indian and the United States Government, and are precedence for our contention that an action like the case at bar must be brought, if at all, by the United States Government through the United States Attorney, are:

United States v. Fitzgerald, 201 F. 295;
Mosier v. United States, 198 F. 54;
Cramer v. United States, 261 U. S. 219;
United States v. Waller, 243 U. S. 452.

B

I.

A State's Police Power is One of the Highest Attributes of Sovereignty and That Power Has Never Been Delegated by the Several States to the Federal Government.

Under our form of government, the powers of the Federal government are limited to those granted to it,

either expressly or by implication, in the United States Constitution. All other powers are reserved to the State governments. This fundamental principle, with respect to the police power of the state, is cogently enunciated by the supreme court in the case of *Prigg v. Pennsylvania,* 41 U. S. (16 Pet.) 539, 10 L. Ed. 1060. We quote from page 625:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be misunderstood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the States, and has never been conceded to the United States."

II.

The Police Power Can Neither be Abdicated Nor Bargained Away and is Inalienable Even by Express Grant.

From *Atlantic Coast Line v. Goldsboro,* 232 U. S. 548, at page 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; *that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."* (Italics ours.)

To the same effect: *Chicago & A. R. R. Co. v. Tranbarger,* 238 U. S. 67, 35 Sup. Ct. Rep. 678; *Butchers' Union S. H. & L. Co. v. Crescent City L. S. L. & S. H. Co.,* 111 U. S. 746, 4 Sup. Ct. Rep. 652; *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 14 Sup. Ct. Rep. 437; *Holden*

v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383; *Champion v. Ames,* 188 U. S. 321, 23 Sup. Ct. Rep. 321; *Chicago, H. & St. P. R. Co. v. Minneapolis,* 232 U. S. 430, 34 Sup. Ct. Rep. 400; *Phillips Petroleum Co. v. Jenkins,* 297 U. S. 629, 56 Sup. Ct. 611.

III.

UPON ADMISSION INTO THE UNION, A STATE BECOMES POSSESSED OF ALL THE RIGHTS AND POWERS COEQUAL WITH HER SISTER JURISDICTIONS.

Under the decisions of the Supreme Court of the United States, Congress was without power to admit the State of Washington into the Union shorn of the right to protect its wild game and fish upon land and waters, otherwise subject to its jurisdiction.

The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent sovereignty imports certain inherent powers which cannot be restricted either by express provision in the Enabling Act or by prior treaties. If such treaties exist at the time the new state is admitted, then the admission repeals the treaty to that extent.

The pronouncements of our supreme court provide a basis for the rule which may be succinctly stated as this: Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal Constitution, and that any other attempted limitation cannot be enforced. While there are numerous decisions sustaining this principle, no case furnishes a clearer enunciation of the rule than that of *Coyle v. Smith,* 211 U. S. 559, 55 L. Ed. 853 (which was reaffirmed

by this court in the very recent case of *Skiriotes v. State of Florida*, 313 U. S. 69, 61 Sup. Ct. 924). The Oklahoma Enabling Act provided that the state capitol should not be changed from the City of Guthrie until 1913. In 1910 the legislature passed an act providing for a change in contravention of this provision, and the question of the binding effect of the Enabling Act came before the court. The court concluded that this attempted limitation was not binding upon the state, saying at page 565:

"The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?"

After stating the contentions of counsel, the court referred to that provision of the constitution which authorizes Congress to admit "new states into this Union" and said (p. 567):

" 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself. *To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation*

admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the constitution, but only such as had not been further bargained away as conditions of admission." (Italics ours.)

The final conclusion of the court is then summarized upon page 573 of the opinion, where the court said:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission."* (Italics ours.)

Among the authorities cited in support of this statement is the case of *Ward v. Race Horse,* 163 U. S. 504, *supra,* clearly indicating that the court intended the rule to be applicable to limitations imposed by prior treaties as well as those inserted in enabling acts. And again, upon page 576 of the opinion, the court referred to the *Race Horse* case in the following language:

"In Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming." (Italics ours.)

We regard this statement as absolutely decisive on the point that the State of Washington acquired supreme control over its wild life when statehood was declared. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its

police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state.

This principle is affirmed in many cases by the supreme court:

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565;
Permoli v. First Municipality of New Orleans, 3 How. 589, 11 L. Ed. 739;
Strader v. Graham, 10 How. 82, 13 L. Ed. 337;
Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442;
Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487;
Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629;
Bolln v. State, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382;
Cardwell v. American Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423.

IV.

The Treaty Making Power was Never Intended to Abridge the Right of a State to Regulate its Strictly Internal Affairs. The Stevens Treaty of 1855 Did Not Curtail or Abridge the Police Power of the Future State of Washington, and Upon its Admission Into the Union, the State Became Endowed with Complete Police Powers.

In construing the provisions of a treaty, the supreme court has upheld the police power of the states wherever possible.

In the case of *DeGeofroy v. Riggs,* 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295, the court held that the treaty

making power was never intended to abridge the right of a state to regulate its strictly internal affairs. We quote from page 267:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the acts of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

To the same effect:

Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. 1076;

Compagnie Francaise de Navigation A Vapeur v. State Bd. of Health, 186 U. S. 380, 394, 395, 46 L. Ed. 1209, 1216, 1217, 22 Sup. Ct. 811;

Patsone v. Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 34 Sup. Ct. 281.

The *Patsone* case involved the constitutionality of a wild game statute enacted by the Pennsylvania legislature making it unlawful for any unnaturalized foreign-born resident to kill wild birds or animals, and the validity of such statute as applied to an Italian citizen in view of a treaty with Italy consummated in 1871 guaranteeing equal protection and security for persons and property. The court held that the statute in question was not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment and did not prevent the state from exercising its power for preservation of wild life for its own citizens. We quote from the opinion delivered by Mr. Justice Holmes, page 146:

"It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve

for its own citizens if it pleases. *Geer v. Connecticut,* 161 U. S. 519, 529. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent."

Section 8 of the Enabling Act (Rem. Rev. Statutes I) under which Washington was admitted as a state, provides in part:

"And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, *on an equal footing with the original states, from and after the date of said proclamation."* (Italics ours.)

It should be borne in mind that a treaty is not a contract. While it is the supreme law of the land, it may be repealed by Congress either expressly or by necessary implication. Neither does a separate rule obtain with respect to Indian treaties. As was said in the case of *Cherokee Tobacco v. United States,* 11 Wall. 616, 20 L. Ed. 227, at p. 621 of 11 Wall:

"A treaty may supersede a prior act of Congress * * *, and an act of Congress may supersede a prior treaty. * * *. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian Nations, within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the

government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered."

To this may be added the general rule of construction discussed under the previous heading that the admission of a state into the Union imparts an equality of power over internal affairs on an equal footing with the other states. And in *Escanaba Company v. Chicago,* 107 U. S. 678, the court speaking through Mr. Justice Fields said, at page 683:

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

And further at page 688:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states.

The leading case upon this, both because of its statement of the general rule and also because of its remarkable similarity to the case at bar, is the case of *Ward v. Race Horse,* 163 U. S. 504, 41 L. Ed. 244. In that case it appeared that the Treaty of 1869 between the Bannock Indians and the United States contained the following provision:

"But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

At the time of the passage of that treaty there was in existence an act of Congress creating the territory of Wyoming, which provided that nothing in the act should impair the treaty rights of the Indians as they then existed. In 1890, however, Wyoming was admitted into the Union under an enabling act, section 1 of which act provided:

"That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified, and confirmed."

In 1895 an act was passed by the legislature of Wyoming regulating the killing of wild game, and in the same year the petitioner, Race Horse, a member of the Bannock tribe, was arrested and charged with killing elk upon unoccupied land of the United States in violation of this statute. The case went by *habeas corpus* to the Supreme Court of the United States, which court held that the admission of Wyoming upon an equal footing

with the original states operated *pro tanto* to repeal the treaty in so far as it might be construed to restrict the power of the sovereign state to regulate the taking of wild game. In the course of its opinion the court said (p. 511):

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. *These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority.* But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule." (Italics ours.)

And reviewing many authorities in respect to this general rule, the court continued (p. 514):

"The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the

other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

We shall briefly compare the facts in that case with those in the case at bar. First, as to the territorial act, in the *Race Horse* case the territorial act provided that the organization of such territory should not be deemed destructive of any treaty rights of the Indians. The act of Congress of March 2, 1853 (10 Stat. at Large, page 172), which organized the territory of Washington, contains a similar provision with respect to Indian treaties. Second, as to the treaties, in the *Race Horse* case the provision of the treaty was that the Indians should have the right to hunt upon all unoccupied lands of the United States as long as peace subsisted. In the present case the treaty under consideration gives the Indians the right to hunt upon all open and unclaimed lands (a provision identical with the Bannock treaty), and in addition the

right to fish at all usual and accustomed places. Third, as to the Enabling Act, the Wyoming Enabling Act admitted Wyoming into the Union "on an equal footing with the original states in all respects whatever." The Washington Enabling Act provides that the states named therein "shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states." The phraseology is somewhat different but the effect is the same.

It will thus be seen that in their material facts there is no difference between the *Race Horse* case and the case at bar.

Neither is there anything inconsistent with that decision in the subsequent case of *United States v. Winans,* 198 U. S. 371, 49 L. Ed. 1089. The question of the power of the state was not there involved. That was merely a controversy between the Indians and a riparian owner who sought to exclude the Indians from taking advantage of a servitude imposed upon the land by the United States, which was the original proprietor and owner of the land. Indeed, the *Race Horse* case is nowhere mentioned in that decision.

V.

The Protection of Fish and the Regulation of Fishing is for the Common Benefit of the People, and Legislation Directed to that End is a Valid and Proper Exercise of the Police Power. Over Fish Found Within its Waters, and of Wild Game, the State has Supreme Control.

The decisions of the courts in this country, from the supreme court down, are in unison in holding that the

wild life, including animals, fish and fowl, is under the control of the state which holds the title thereto in trust for all the people, and in the regulation of and restrictions upon the taking of game and fish within the jurisdiction of a state, the sovereign is but dealing with its own property over which its control is absolute.

The supreme court of the United States, in the early case of *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, very succinctly and clearly enunciated the nature of this trust and ownership by the state as follows:

" 'Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell,* 16 Pet. (367) 410 (10 L. Ed. 997), represents its people, and the ownership is that of the people in their united sovereignty'."

This principle has never been departed from, but on the contrary, has been the basis for permitting the States to exercise the widest latitude of discretion in determining what measures are necessary and expedient to protect these valuable natural resources.

The United States Supreme Court early declared that each State has the right and power of a proprietor and sovereign to control, regulate, restrict, and license the

enjoyment by individuals of the privilege of taking fish from its public waters.

McCready v. Virginia, 94 U. S. 391, 397;
Manchester v. Massachusetts, 139 U. S. 240, 266, 11 Sup. Ct. 559.

Numerous holdings might be cited, but we refer to the latest pronouncement of the supreme court in *Bayside Fish Flour Co. v. Gentry,* 297 U. S. 422 (decided March 2, 1936).

The suit was brought to enjoin the State of California from enforcing certain provisions of the State Fish and Game Code, alleged to contravene the commerce clause and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

The facts are summarized in the opinion delivered by Mr. Justice Sutherland, as follows, quoting from page 423:

"Appellant is a California corporation engaged in the business of manufacturing, from the meat of sardines, fish flour for human consumption. The sardines are caught by fishermen upon the high seas beyond the three-mile limit to which the jurisdiction of the state extends, sold to appellant, and brought into the state and there reduced to fish flour at appellant's reduction plants. The fish flour is made with the expectation of selling and shipping it in interstate and foreign commerce; and it is so sold and shipped and is used as food in the United States and foreign countries. Sardines are a migratory fish found in great numbers in the Pacific Ocean beyond the three-mile limit as well as within that limit. So far as known, they spawn upon the open seas. In the process of reducing the fish, appellant uses a portion for producing flour for human consumption, the remainder being converted into a meal used for chicken feed, and into fertilizer, fish oil and other nonedible substances.

"Sardines caught in the same way are also purchased by packers, who clean, cook, and can or preserve them for human food, using in that process only a part of the fish and utilizing the remainder for reduction into non-edible products.

"The provisions of the Fish and Game Code which appellees threaten to enforce against appellant and those necessary to be considered in that connection are copied in the margin. The bill alleges that appellees will prevent appellant from manufacturing fish flour in its reduction plants while at the same time permitting packers to use sardines, taken from the waters of the state or those outside, in their packing plants."

This case reaffirms several rules relative to a state's police power over its wild game and fish to which our Supreme Court is unqualifiedly committed.

(a) *That a state has supreme control over its wild life and* (b) *may conserve its aquatic resources as it deems expedient, although interstate commerce may be remotely affected.*

Quoting from page 425:

"There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local. Whether the product is consumed within the borders of the state or shipped outside in interstate or foreign commerce are matters with which the act is not concerned. *The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game generally, the state has supreme control.* Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from

the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz v. Hesterberg,* 211 U. S. 31, 39-40.

"If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to *Silz v. Hesterberg, supra,* pp. 39 *et seq.,* and *Van Camp Sea Food Co. v. Department of Natural Resources,* 30 F. (2d) 111, where the decisions are collected." (Italics ours.)

(c) *State regulations bearing a reasonable relation to an object within the state police power—e. g. the conservation of the State's fish supply—cannot be declared invalid because a court may regard them as ineffectual, or harsh in particular instances or as aids to an objectionable policy.*

Quoting from page 427:

"These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. *McLean v. Arkansas,* 211 U. S. 539, 547-548. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska,* 170 U. S. 57, 77. And see, generally, *Chicago, B & Q. R. Co. v. McGuire,* 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (p. 569), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance'."

VI.

Fish and Game Laws of the State of Washington Are Regulatory Measures and Constitute a Lawful Exercise of the State's Police Power. It Has for Its Purpose the Necessary Preservation of the State's Commercial and Game Fisheries, and Meets All the Requirements That the Lawful Exercise of Police Power Must Be Reasonable, Nondiscriminatory, and Nonarbitrary.

The statute in question is nondiscriminatory and uniformly operates on all citizens alike. It is not a measure designed to regulate Indian fishing, but on the contrary is a conservation measure, having for its purpose the protection and perpetuation of the commercial fishing industry in the State of Washington.

The test for determining whether or not the legislative enactment is a proper exercise of the police power is plain, simple, and sound, and is announced in *Lawton v. Steele*, 152 U. S. 133, which has been frequently cited with approval. The Supreme Court held that laws prohibiting the use of certain types of gear in state waters was a valid exercise of state police power to preserve from extinction fish in waters within its jurisdiction. We quote from page 140 of the opinion:

> "An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, *unless it is plainly violative of the Constitution or subversive of private rights.*" (Italics ours.)

And again in the same case at page 137, it was stated that:

> "It must appear first, that the interests of the public generally, as distinguished from those in a particular class, require the interference; and, second, that the

means are reasonably necessary for the accompaniment of the purpose and not unduly oppressive upon individuals."

The state's power to regulate its fisheries, and the extent thereof, is well summarized in 22 *Am. Juris.*, paragraph 34, page 691, as follows:

"The state has the power to regulate fisheries in public and private streams, and to adopt such appropriate means as may seem best to it for the preservation of edible fish for the benefit of the people; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution. The right of the state to regulate fisheries for the preservation of fish applies not only to edible fish but also to those valuable for any purpose. This right to regulate fish and fisheries may be based either on the police power of the state to enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth, or on the circumstance that the fish in the waters of the state, as well as the game in its forests, belong to the people in their sovereign capacity, and are not the subject of private ownership, except in so far as the people may elect that they shall be. It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors, as well as of trespassers. The state may prohibit the catching of fish within its waters; if it allows the catching, it may regulate it by the imposition of such conditions, restrictions, and limitations as it deems needful or proper. The state may prohibit the taking of fish by methods other than those prescribed by law, may prescribe the size of fish taken, may prohibit the pollution of waters within its limits, and may also either prescribe limitations as to the disposition of fish once they have been taken or forbid their sale."

In *11 R. C. L.*, paragraph 34, page 1046, we find this statement:

"By reason of the fact that title to fish and game within the boundaries of a state is vested in the people of the state in their sovereign capacity, the legislature has greater power over such property than it has over almost any other commodity, and in order to preserve such property to the people of the state, the law making assembly may enact that only citizens of the state shall take fish from the waters within its jurisdiction."

Under the state's police powers to regulate its fisheries, the courts have held that it is within its powers to protect its waters from pollution (*People v. Truckee Lbr. Co.,* 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581); to declare as public nuisances any obstruction of its streams or gear used in illegal fishing (*State v. Mavrikas,* 148 Wash. 651); to compel adequate fishways for free migration of fish (*Inland Fisheries v. Holyoke Water Power Co.,* 104 Mass. 446, 6 Am. Rep. 247, aff'd 15 Wall (82 U. S.) 500, 21 L. Ed. 133); to regulate the time of taking (*State v. McGuire,* 24 Ore. 366, 33 Pac. 666, 21 L. R. A. 478); the manner of taking (*Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499, 38 U. S. (L. Ed.) 385); the possession of (*State v. Schuman,* 36 Ore. 16, 58 Pac. 661, 47 L. R. A. 153); the disposition of (*Commonwealth v. Gilbert,* 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439); and the use of (*Van Camp Sea Food Co. v. Department of Natural Resources,* 30 Fed. (2d) 111); provide for the forfeiture of gear used in illegal fishing (*Lawton v. Steele, supra*) and make it a criminal offense to take fish in violation of its regulations (*Lawton v. Steele, supra*).

Reasonable regulation also includes the licensing of sports and commercial fishermen. A state may refuse to license citizens of other states (*State v. Kofines,* 33 R. I. 211, 80 Atl. 432, Anno. Cas. 1913C 1120; *Wharton v. Wise,* 153 U. S. 155, 14 S. Ct. 783, 38 U. S. (L. Ed.) 669.)

The state may lawfully graduate the license fee schedule according to the types of fishing in which the licensees engage (*State v. Hanlon,* 77 Oh. St. 19, 82 N. E. 662, 13 L. R. A. (N. S.) 539).

The licensing of fishing privileges has been sanctioned as a valid exercise of police power in the regulation and protection of this valuable aquatic resource. (*State v. Snowman,* 50 L. R. A. 545; *Lacoste v. Department of Conservation,* 263 U. S. 545; *Anderson v. Smith* (C. C. A. Ninth Circuit) 71 F. (2d) 493; *Bayside Fish Flour Co. v. Gentry,* 297 U. S. 422).

In the *Lacoste* case the Supreme Court decreed that it was within the valid exercise of the state's police power to require payment of a tax upon the skins or hides of wild animals as a condition precedent to transferring its title to the dealer paying the tax.

We quote from page 550:

"Our examination of this act discloses no reason why the decision of the state court should be disturbed. The legislation is a valid exertion of the police power of the State to conserve and protect wild life for the common benefit. It is within the power of the State to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership."

In the *Anderson* case the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Wilbur, upheld the right of the Territory of Alaska to fix license fees for fishing in waters of Alaska, and in so doing may discriminate between residents and nonresidents, provided that license exacted of the citizens of the United States nonresident in Alaska is not so exorbitant as practically to prohibit or so unreasonable as to interfere with rights of fishing granted by Congress.

In the *Bayside Fish Flour Co.* case the United States Supreme Court sustained the right of the State of California to exact a license for each plant or place of business engaged in the preservation of fish and the manufacture of fish scrap products.

VII.

Fishing Places in Question Are Outside the Boundaries of the Makah Indian Reservation and Within the Sole Jurisdiction of the State.

Under the explicit terms of the treaty, the fishing grounds in question are within the jurisdiction of the State of Washington.

The sole issue then is resolved into whether or not the state is circumscribed in its police powers by the reservations in the treaty of "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States."

Appellants contend their position is conclusively determined in *United States v. Winans,* 198 U. S. 371, 25 Sup. Ct. 662, and *Kennedy v. Becker,* 241 U. S. 556, Sup. Ct. 705. Also to the same effect is *Lawton v. Steele,* 152 U. S. 133, wherein we find this pertinent language at page 139:

"As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings,* 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish,

is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food."

The decisions of the supreme court of the State of Washington follow these cases without departure.

This same question has been passed upon by the supreme court of the State of Washington in five cases. *State v. Towessnute,* 89 Wash. 478; *State v. Alexis,* 89 Wash. 492; *State v. Meninock,* 115 Wash. 528; *State v. Wallahee,* 143 Wash. 117; and *State v. Tulee,* Vol. 107 Wash. Dec. 44.

In construing this identical article of the Stevens Treaty, these decisions uniformly and unequivocably hold that the Indians' fishing rights "at usual and accustomed grounds and stations" off the reservation are subject to the paramount and superior right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of fish from the waters of its jurisdiction, and that an Indian fishing off the reservation must do so "in common with all citizens of the United States."

The question of Indian fishing rights arising under the Stevens Treaty of 1855 was first tested in the Washington Territorial Court in the case of *U. S. v. Taylor,* 3 Wash. Terr. 88, decided January 25, 1887. The United States brought suit to restrain one Frank Taylor from maintaining a fence around a large body of land abutting on the Tum Water Fisheries on the Columbia River which obstructed the land approach to the fishery. The defendant had obtained a patent in fee simple from the United States to the lands and claimed a right to enclose his property for the protection of his growing crops. An

injunction was granted by the district court and reversed by the supreme court of the territory on the grounds that the treaty imposed a servitude on the land which could not be extinguished by the vesting of a fee simple title. The police power of the future state was not considered. The court confined its decision to granting the Indian his primitive rights to fish by ancient methods for food for himself and family.

Governor Stevens made treaties with several Indian tribes in the territory of Washington in the year 1855. Practically all of these treaties, if not all of them, contained a clause relative to fishing off the reservations. The clause in the Yakima Treaty similar to the one now under consideration next came before the supreme court of the State of Washington to determine the meaning of the phrase "in common with the citizens of the territory," in the case of *State of Washington v. Towessnute,* 89 Wash. 478, decided Feb. 4, 1916. Towessnute, contrary to state law, was fishing without a license, snagging salmon with a gaff hook, and catching fish without hook and line on the Yakima River. The case held that the Indian had exclusive fishing rights on the reservation and nothing but equality with the white man outside the reservation. That the main purpose of the government was to separate the Indian from the white man and care for the Indian in a district more confined. Yet, it was natural to indulge him with hunting and fishing at his old hunting and fishing grounds; that the white man might not by crafty statute cut off the Indian's privilege at these places outside the reservation. The court reviewed *Ward v. Race Horse,* 163 U. S. 504, involving the principle that Congress by act of admitting Wyoming

as a state revoked whatever in the treaty might have impaired the future police power of the state. The court also reviewed *U. S. v. Winans,* 198 U. S. 371, holding that land grants would not impair Indian easements on ancient fishing spots, that the easement privilege might not be put above police power. "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The Supreme Court of the State of Washington handed down on the same day the case of *State of Washington v. Alexis,* 89 Wash. 492, which is identical in all respects with the *Towessnute* case, except it involved the fishing rights of the Lummi Indians and the Muckelteeoh Treaty proclaimed in 1859, the language of the treaty being exactly the same as the Yakima Treaty. The court held the case was on all fours with the *Towessnute* case and on petition for rehearing, decided March 17, 1916, held that Congress in making provisions by an Indian treaty could not do so at the expense of the police power of the future state, notwithstanding the fact that the Indians were more or less dependent upon the fish for subsistence. The case was different from the *Towessnute* case in that the testimony showed the Lummi Indians gained a livelihood by trafficking in fish. The court said:

"Under Federal decisions, as we understand them, Congress, in making provisions for the Indians, could not do so at the expense of the police power of the future state. The Lummi case strikingly shows to what ravages the salmon industry of Washington is exposed by these Indian treaties, as they are sought to be interpreted."

The rights of the Yakima Indians were next adjudicated by the highest court of Washington in the case of *State of Washington, respondent v. George Meninock,* 115 Wash. 528, decided in April, 1921. Defendants were Yakima Indians maintaining their tribal relations and living on the Yakima reservation. They were adjudged guilty of illegal fishing 400 feet below the Prosser Dam in the Yakima River. The court affirmed the *Towessnute* case, finding that the pronouncements of our supreme court were fortified and in perfect consonance with the conclusion reached by the Supreme Court of the United States in *Kennedy v. Becker,* 241 U. S. 556, which was decided in 1916.

If there be any doubts as to the finality of the commitments of this court in the cases just cited, they are set at rest in the decision handed down in *State of Washington v. Jim Wallahee,* 143 Wash. 117, decided in March, 1927. The identical article of the Stevens Treaty now under scrutiny was considered for the fourth time by this court in connection with the state's right to punish a Yakima Indian for violation of state game laws outside the reservation. While this case did not involve fishing rights, this court not only adhered to the *Towessnute, Alexis* and *Meninock* decisions, but also quoted with approval the principles laid down in *Ward v. Race Horse,* 163 U. S. 504, as authority for the proposition that the sovereign powers inherent to a state passed to the State of Washington when admitted to statehood and held that Yakima Indians outside the boundaries of their reservation had no greater immunity to state game and fish laws than any other citizen of the state. The following decisive language is employed by this court:

"Under the authority of our own decisions and under the authority of *Ward v. Race Horse, supra,* had we not already decided the question, the judgment would have to be and it is affirmed."

The factors controlling the holdings of this court on the broad proposition involved herein which was first announced in the *Towessnute* case, and has been fortified on each of the three succeeding occasions, are very poignantly regimented in the *Wallahee* decision at page 118:

"This is the identical treaty and, indeed, the identical article of the treaty discussed and considered by this court in *State v. Towessnute,* 89 Wash. 478, 154 Pac. 805; *State v. Alexis,* 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041, and *State v. Meninock,* 115 Wash. 528, 197 Pac. 641. Those cases, however, are concerned only with the fishing rights under the treaty, while this case involves the hunting privilege. Appellant seems to contend that those cases are not decisive of this because of the employment of the term 'in common with the citizens of the territory' in connection with the fishing rights, while no such limiting phrase is used in connection with the hunting right or privilege.

"It is true that in the *Towessnute* case, an argument was based upon these words, but only as an added consideration. *The real question and the whole question was decided by that part of the opinion which holds that the United States government was the sovereign and did not undertake to part with its sovereign rights by the treaty, that the Yakima tribe was not an independent nation nor a sovereign entity of any kind, the Indians being mere occupants of the land, and at that time and ever since were subject to the sovereignty of the United States; that then, and at all times up to statehood, the Federal government had the sovereign power to regulate or forbid the taking of game; and within our territorial jurisdiction, that sovereign power passed to the state of Washington when admitted to statehood.* The other cases in this court follow the *Towessnute* case, though in the *Meninock* case Judge Parker ably supported and added to the argument of the earlier case. It is useless

to repeat or quote from these earlier decisions. Almost every word is in point, and we are bound by their logic no less than by the rule of precedent." (Italics ours.)

The Ninth Circuit Court of Appeals in the case of *United States of America* on behalf of its ward, *Sampson Tulee v. House* (decided April 3, 1940), held that while the court had jurisdiction of the case, it was not a proper one for the exercise of such jurisdiction and following the rule laid down in the case of *United States ex rel. Kennedy v. Tyler,* 269 U. S. 13, held that the cause should be tried in the state courts. The case was then carried up through the state courts to the supreme court of the State of Washington where an *en banc* decision was filed on January 13, 1941. In the case of *State of Washington v. Sampson Tulee,* 107 Wash. Dec. 42, the supreme court reviewed all previous opinions of the court and adhered thereto.

We further invite the court's attention to decisions from other states involving Indian fishing off the reservation.

State v. Morrin, 117 N. W. 1006 (1908), the Wisconsin Supreme Court held the treaties of 1843 and 1854 between the United States and the Chippewa Indians, preserving to such Indians the right to hunt and fish on the territory ceded by them to the United States, were abrogated so far as such territory was included within the State of Wisconsin by the admission of the state into the Union under *Ward v. Race Horse,* decided in 1895. The defendant was a Chippewa and was convicted of the violation of state laws by using gill nets to fish in the waters of Lake Superior. The court also predicated its decision on the fact an Indian was made a citizen under act of Congress, 1887:

"His status is like that of every other citizen, and subjects him to penalties for the violation of any state law."

State v. Johnson, 249 N. W. 284, decided by the Supreme Court of Wisconsin in 1923. A Chippewa Indian, while hunting for deer out of season mistook a white man for a deer and shot him. The locus of the crime was on the Indian reservation. The defendant was a tribal Indian, holding land on the reservation, held in trust by the government. The questions involved were: 1. Had the state court jurisdiction to try and determine the prosecution of an Indian for a crime committed on patented land? 2. Had the state jurisdiction to try an Indian for the crime of hunting out of season within the exterior boundaries of a reservation? Both were answered in the affirmative.

The Supreme Court of Michigan in an unanimous decision adopted the same position taken by this court in the case of *People v. Chosa,* 252 Mich. 154, 233 N. W. 205, decided in 1930. This case involved the rights of Indians under treaty to hunt and fish in violation of general game laws of the state on lands ceded by their tribe to the United States. After reciting the applicability of such holdings as *Geer v. Connecticut, Ward v. Race Horse, United States v. Winans, Kennedy v. Becker,* the court said:

"These cases are conclusive on the effect of the treaties at bar. The treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the state.

* * * * * * * * * *

"As a restriction on operation of State game laws, it would be foreign to our system of government in pro-

viding control of sovereign powers of the State by an officer of another sovereignty. It must, therefore, be held that defendants are subject to the game laws of the State, on the lands covered by the treaties, to the same extent as the general public.

"This ruling is sustained by another consideration advanced by the people.

* * * * * * * * * *

"When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country. 11 C. J. p. 786."

The Federal courts in this district have interpreted Indian fishing rights under the Stevens Treaty in the following cases:

The James G. Swan, 50 Fed. 108;
United States v. Alaska Packers, 79 Fed. 152;
Seufert v. Olney, 193 Fed. 200;
United States v. Winans, 73 Fed. 72;
United States v. Taylor, 44 Fed. 2;
United States v. Seufert Bros. Co., 78 Fed. 520.

VIII.

THE MAKAH INDIAN TREATY SECURED TO THE MEMBERS OF THE FEDERATED MAKAH TRIBE A VESTED EASEMENT RIGHT OF INGRESS TO AND EGRESS FROM THEIR "USUAL AND ACCUSTOMED GROUNDS AND STATIONS" OUTSIDE THE RESERVATION, THERE TO FISH "IN COMMON WITH ALL CITIZENS OF THE UNITED STATES"; SUBJECT TO ANY VALID EXERCISE OF THE RIGHT OF THE SOVEREIGN WHICH IS OPERATIVE ON ALL ALIKE FOR THE BEST INTERESTS OF THE STATE'S AQUATIC RESOURCES.

Under this heading we propose to incorporate our reply to appellees' contentions and set forth the state's position on the construction which must be given to the particular words in the treaty under examination.

Appellees contend that the language in the treaty "*the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States,*" secured to the Makah Tribe not only an easement right of occupancy, but also a property right in the fish, which are protected under the Fourteenth Amendment to the Constitution of the United States, without interference in the exercise of this right in any manner, by regulation or otherwise, by the State of Washington.

It is the State's contention that the treaty imposed a perpetual easement on the ancient fishing sites, there to fish in common with all citizens of the United States, subject to the paramount and superior right of the state under the exercise of its sovereign police powers to regulate the taking of fish from the waters within its jurisdiction.

While we do not accede to the proposition advanced by appellee that, the treaty secured to the Indians a perpetual property right in the fisheries, the protection of alleged vested property rights sought to be invoked under the Fourteenth Amendment in derogation of the State's police power, is answered in the case of *Thomson v. Dana,* 52 Fed. (2d) 759, 762 (District Court D, Oregon):

"Therefore it must be concluded that the protection of property rights, and the equal protection of the laws, vouchsafed by the Fourteenth Amendment, depend entirely upon the same principles, when applied to regulation of the fisheries of a state. See *Patsone v. Pennsylvania,* 232 U. S. 138, 143, 34 S. Ct. 281, 58 L. Ed. 539. Conservation of fish for the common good of all citizens of a state is paramount, and reasonable regulations to attain that end do not infringe upon the property pro-

tective, the equality, nor even the commerce clauses of the Constitution of the United States."

To determine what rights the Indians secured unto themselves under the Stevens Treaty of 1855, requires an excursion into the history of Indian litigation.

The status of Indian title first came before the Supreme Court of the United States in 1810 in the case of *Fletcher v. Peck,* 6 Cranch. 87, 3 L. Ed. 162, where the court held that the State of Georgia was seized in fee of certain lands to which the Indian title had not been extinguished. In concluding that opinion, Justice Marshall said (page 141):

"The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."

This case was followed in 1923 by the famous case of *Johnson v. McIntosh,* 8 Wheaton 542, 5 L. Ed. 681. That case involved the question of whether or not certain Indians had a right to convey land occupied by them without the consent of the Federal government. The court held that the fee simple title to the Indian lands was vested first in the European nations by right of discovery and then in the government by treaty and by the Revolutionary War.

We quote from page 592:

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the

law of the land, and cannot be questioned. * * * However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual conditions of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."

In 1831 the *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L. Ed. 25, was decided. That case involved the question of whether or not the Cherokee Nation was a foreign state in the sense that it might sue the State of Georgia in the supreme court under that provision of the constitution which gave to the court jurisdiction over controversies between states and foreign states. Justice Marshall answered this question in the negative, saying (page 17):

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will* which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian." (Italics ours.)

In the following year the case of *Worcester v. Georgia,* 6 Peters 515, 8 L. Ed. 483, came before the court where it was held that Congress under the constitution had the right to regulate commerce and intercourse with the Indian tribes and that this power could not be curtailed or restricted by state legislation.

In 1842 the case of *Martin v. Waddell,* 16 Peters 367, 10 L. Ed. 997, was decided by the highest court. That

case involved a controversy between certain persons who claimed title to certain oyster beds in New Jersey. The plaintiffs claimed by conveyances under a charter granted to the Duke of York by Charles II of England. The defendant claimed under patent from the State of New Jersey. The court held that no fishing rights passed under the charter by reason of its peculiar provisions, and that such rights were consequently vested in the State of New Jersey. At the same time, however, the court observed that the grant to the Duke of York might have included all of the attributes of sovereignty, saying (p. 409):

"*The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned.* But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown, in the country discovered by its subjects, on this continent; and the principles upon which it was parceled out and granted.

"The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, *and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.* Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants." (Italics ours.)

This case, we submit, is absolutely decisive upon this proposition. The ruling in substance was, that title to the oysters in question first vested in the king by right

of discovery, and then in the State of New Jersey by reason of the Revolution. The opinion clearly holds that the Indian right of occupancy does not include the title to wild game, which is vested in the nation, and to which title the states have succeeded.

In 1846 the question of the power of the Federal government to extend its criminal statutes over lands occupied by the Indians came before the court in the case of the *United States v. Rogers,* 4 Howard 566, 11 L. Ed. 1105. This power was affirmed by the court in the following language (p. 571):

"It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States *and under their authority.* The native tribes who were found on this continent at the time of its discovery had never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, *and the Indians continually held to be, and treated as, subject to their dominion and control."* (Italics ours.)

The court after concluding that it was useless to inquire into the abstract justice of this right, continued:

"It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit to dispute, *that the Indian tribes residing within the territorial limits of the United States are subject to their authority,* and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."

Congress has always exercised complete sovereignty over the property and rights of the Indians (*Cherokee Tobacco v. United States,* 11 Wall. 616, 20 L. Ed. 226; *United States v. Cook,* 19 Wallace 591, 22 L. Ed. 210; *Beecher v. Wetherby,* 95 U. S. 517, 24 L. Ed. 440; *Butz v. Northern Pacific Railway Company,* 119 U. S. 55, 30 L. Ed. 330; *United States v. Kagama,* 118 U. S. 375, 30 L. Ed. 228; *Choctaw Nation v. United States,* 119 U. S. 1, 30 L. Ed. 306; *Cherokee Nation v. Railway Company,* 135 U. S. 641, 34 L. Ed. 295; *Stephens v. Cherokee Nation,* 174 U. S. 445, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock,* 187 U. S. 294, 47 L. Ed. 183; *Lone Wolf v. Hitchcock,* 187 U. S. 553, 47 L. Ed. 299; *Conley v. Ballinger,* 216 U. S. 84, 54 L. Ed. 393).

While the tribal organizations were recognized for the purpose of convenience in dealing with the Indians, even this form of dealing was abolished by Act of Congress of March 3, 1871 (Section 2079, Revised Statutes).

From the language in the treaty it is plain that as to streams running through and bordering on the Makah reservation the exclusive right of taking fish in such waters is reserved to the confederated tribe.

It is the cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every section, clause, or word used (25 R. C. L. 246, p. 1004).

Clearly, from the language employed, "at their usual and accustomed grounds and stations" outside the reserved area, it was intended to mean that they had certain fishing rights outside the reservation, and were not to be restricted solely thereto.

We do not ordinarily secure a restriction of an existing right. We ordinarily secure a benefit. We do not ordinarily secure a curtailment of what is already possessed.

What rights were secured? Not common fishing rights with the white man outside the reservation. If that had been the intention, appropriate words would have been employed. The words used were: "at usual and accustomed grounds and stations in common with all citizens of the United States."

The only logical construction to be given this significant language is that it impressed upon all the domain included in this large cession of land the Indians made to the government a perpetual easement to guarantee the tribe ingress to and egress from *"usual and accustomed grounds and stations,"* and this, no matter if the ceded lands were thrown open to settlers, no matter if white men obtained a fee simple patent, they always took it subject to the right of the treaty Indians to go to and from said ancient fishing grounds and enjoy fishing at their accustomed grounds and stations.

That this was the intendment is made clear in the case of *United States v. Winans,* 198 U. S. 371, 49 L. Ed. 1089. In that case it appeared that the defendant, Winans, was the owner of certain lands adjoining an ancient and accustomed place of fishing of the Yakima Indians on the Columbia River. Winans erected a fish wheel at this place and refused to allow the Indians to go across his land for the purpose of fishing. The government, in behalf of the Indians, brought an action to enjoin this refusal and the court held that this provision of the treaty

was intended to cover a situation of this nature. In the course of that opinion the court said (p. 381):

"The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty."

There was no question there involved of the power of the state to regulate the exercise of that right, neither does it appear that the Indians there sought to exercise the right in violation of state law. Indeed, the court was careful to make it clear that the treaty did not interfere with the police power of the state, as appears from that portion of the opinion where it said (p. 384):

"*Nor does it restrain the state unreasonably, if at all, in the regulation of the right.* It only fixes in the land such easements as enable the right to be exercised." (Italics ours.)

In short, this reservation merely affords easements to make possible the enjoyment of the fishing rights, but it does not curtail the authority of the state in the exercise of its police power to regulate the right itself. That is made plain in the opinion of Mr. Justice Hughes in *State ex rel. Kennedy v. Becker,* 241 U. S. 556, 36 Sup. Ct. 705.

In the *Becker* case the supreme court said it was within the competency of the State of New York in the exercise of its sovereign police power to regulate this right precisely as if the land in question had never constituted part of the original land which was ceded.

The *Becker* case involved the proper construction of a certain treaty with the New York Indians, which treaty

provided for the conveyance of certain lands by the Indians and then contained the following reservation:

"Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

The case was a habeas corpus proceeding brought on behalf of certain of the members of this tribe who had been arrested for taking fish in violation of the game laws of New York. The court held that this reservation was a reservation of a right to go upon the lands and exercise hunting and fishing privileges, but that it did not constitute any immunity from general police power statutes of the state regulating the taking of wild fish and game. In the course of its opinion, the court observed:

"*The controversy relates solely to the state power over these Indians* . . . . The argument for the plaintiffs in error has taken a wide range, and embraces an extended history of the dealings with the Six Nations. We do not find it to be necessary to review this interesting history, as the question to be determined is a narrow one. The *locus in quo* is within the state of New York, being within 1 mile from the point where Eighteen Mile creek empties into Lake Erie. It is not within the territorial limits of the Indian Reservation on which the Senecas reside. It is within the territory which was ceded by the Seneca Nation to Robert Morris by the treaty of the 'Big Tree,' of Sept. 15, 1797 [7 Stat. 601] and the question turns upon the construction of this treaty; *that is, no consequences which attached to the reservation therein of fishing and hunting rights upon the lands then granted.* * * * .

"The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not

disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre,* to the extent defined; that is not questioned. *The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally.* It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the state.

" * * * *We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible.* Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, *but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised.* This was clearly recognized in *United States v. Winans,* 198 U. S. 371, 384, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 (12 Stat. at L. 951), said (referring to the authority of the State of Washington): *'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised'."* (Italics ours.)

Surely no one would seriously contend it is within the power of the Indian and beyond the power of the state to prevent the taking of fish by dynamite, or say that the white man is restricted in his methods of taking fish as

a conservation measure, as a necessary precaution to prevent exhaustion of the supply, and the Indian without restraint can use explosives or other destructive methods while fishing alongside the white fisherman.

Once the right of the state to enter the field to do that much is recognized, where is the line of demarcation?

The state can surely impose reasonable regulations where designed for the preservation of the fish in its waters. If you recognize the existence of the power, then the only question to be determined is whether its exercise is arbitrary, capricious or discriminatory. (*Lawton v. Steele, supra.*)

IX.

Indian Treaties Are to Be Given a Liberal Construction, but Must Be Considered in the Light of Current Economic Conditions Prevailing in the Development and Conservation of Our Natural Resources, Having in Mind the Welfare of All the People.

We readily recognize and agree that Indian treaties are to be construed in a broad and liberal spirit.

We think, however, in the interests of the Indians of today and the obligations owing to them from the State of Washington in the light of their present status as full-fledged citizens, an Indian treaty must be reconciled in the light of present day conditions because the respective positions of both parties to the treaty, the red man and the white man, the sovereign state and the Indian nation, have changed. In fact, this is the express pronouncement of the Supreme Court in the case of *State ex rel. Kennedy v. Becker,* 241 U. S. 556, 36 S. Ct. 705, 60 L. Ed. 1166, at page 562 of 241 U. S., 36 S. Ct. 705, 707:

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance,—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. * * * ."

Mr. Justice Hughes, in the case of *West Coast Hotel Company v. Parrish,* 300 U. S. 379 (commonly known as the Washington Minimum Wage Law Case), stated that the reasonableness of the exercise of the police power of the state must be considered in the light of current economic conditions.

The word "economic" is defined in Webster's New International Dictionary, Second Edition (1938), as follows: "Of or pertaining to the management of the affairs of a government or community with reference to its source of income, its expenditures, the development of its natural resources, etc., * * * ."

X.

THE INDIAN, BY ACT OF CONGRESS IN 1924, HAS BEEN MADE A CITIZEN OF THE UNITED STATES AND OF THE STATE IN WHICH HE RESIDES. AS SUCH, HE IS ENTITLED TO ALL THE RIGHTS, PRIVILEGES AND IMMUNITIES ACCORDED OTHER CITIZENS OF THE STATE, AND TO THE EQUAL PROTECTION OF ITS LAWS, AND IS ALSO SUBJECT TO ITS LAWS.

In the case of *Cherokee Nation v. State of Georgia,* 30 U. S. (5 Pet. 1) 1, decided in 1831, Chief Justice

Marshall spoke of the Indian tribes as being in a "state of pupilage; their relation to the United States resembles that of a ward to his guardian." Congress has always exercised complete sovereignty over the Indians and Indian property. In the gradual unfoldment of the government's program to emancipate the Indian, the evolution of the Indian to the full stature of citizenship is one of the most interesting. In the case of *Choteau v. Burnet*, 283 U. S. 691, it was held that the income received from the United States by an Indian, a member of the Osage tribe, as a share from the royalties from the gas and oil leases made by the tribe, is subject to Federal income tax. Mr. Justice Roberts, delivering the opinion of the court, very pointedly sets forth some of the corresponding obligations of citizenship:

"The course of legislation discloses that the plan of the Government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the ownership of property, including the duty to pay taxes."

It has been a policy of the national government to encourage the Indians to abandon their tribal relations and to adopt the life and customs of civilization. Looking to this end, various treaties with the Indian tribes, and special acts of Congress, have provided for allotment of lands to individual Indians, which lands were ultimately to become their property. Such Indians have been required to sever their tribal relations, live on their allotments, and adopt the life and habits of civilized white men. As a further inducement to complete abandonment of their tribal status and old ways of living, Indians to

whom such allotments were granted were made citizens of the United States. The Act of Congress of February 8, 1887 (24 Stat. 388, p. 6), known as the "Dawes Act," provided that "Every Indian born within the territorial limits of the United States, to whom allotments (of land) shall have been made under the provisions of this act, or under any law or treaty, * * * is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." An Act of Congress of March 3, 1901, amending the "Dawes Act," conferred citizenship on the same terms to all Indians in the Indian Territory. And finally, on June 2, 1924 (43 Stat. 253), Congress enacted "That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States."

The rule found in 11 Corpus Juris 786 was cited in *People v. Chosa,* 252 Mich. 154, 162, 233 N. W. 205.

"When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country."

Our courts have held that merely because a party is an Indian, even a tribal Indian, does not necessarily exclude him from the jurisdiction of the state courts nor exempt him from state law. A tribal Indian may be prosecuted in the state courts for a crime committed within the state but outside the reservation. *In re Wolf,* 27 Fed. 606; *United States v. Sa-Coo-Da-Cot,* Fed. Cas. No. 16212, 27 Fed. 923; *Rubideux v. Vallie,* 12 Kan. 28; *State of Washington v. Williams,* 13 Wash. 335, 43 Pac. 15. Moreover, unless specific stipulation is made in the enabling act giving the national government jurisdiction

over Indian reservations within a state, the state has jurisdiction within the reservations to enforce state law with respect to persons other than Indians. *Blue-Jacket v. Johnson County Commissioners,* 72 U. S. 737; *Harkness v. Hyde,* 98 U. S. 476; *Langford v. Monteith,* 102 U. S. 145; *United States v. McBratney,* 104 U. S. 621; *Draper v. United States,* 164 U. S. 240.

Concerning an Indian's status upon becoming a citizen of a state, the United States Supreme Court said in *In re Heff,* 197 U. S. 488:

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the state or territory in which he resides. *As a matter of constitutional law, an Indian appears to be entitled to the benefit of, and to be subject to, the laws of the State in which he resides the moment he becomes a citizen of the United States.* By virtue of the 14th Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges and immunities of other citizens of the state, and to the equal protection of its laws. *Slaughter-House* cases, 16 Wall. 36, 21 L. Ed. 394." (Italics ours.)

In re Heff involved the sale of liquor to an allotted Indian, and the court held that the allotted Indian was removed from the domain of the Federal statutes specifically relating to him as an Indian. The *Heff* case was subsequently overruled in *Hallowell v. United States,* 221 U. S. 317, 31 S. Ct. 587; *Tiger v. Western Improvement Co.,* 221 U. S. 286, 31 S. Ct. 578, and in *United States v. Nice,* 241 U. S. 591, 36 S. Ct. 696, but only in so far as the *Heff* case was authority for the proposition that an Indian on becoming a citizen of a state was no longer subject to national guardianship. The *Nice* case held that the mere fact an Indian had become a citizen, and subject to

state law, did not abrogate the United States authority over him.

"Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

U. S. v. Nice, 241 U. S. 591, 598.

We quote further from the *Nice* case at page 600:

"As pointing to a different intention, reliance is had upon the provision that when the allotments are completed and the trust patents issued the allottees 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state' of their residence. *But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress?* The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with the power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable." (Emphasis ours.)

The *Tiger* and *Hallowell* cases merely stand for the proposition that "guardianship" of the national government over the Indian remains unimpaired by the grant of citizenship, so far, at least, as the guardianship relates to the power of Congress over the lands and property of such citizen Indians. That is, citizen Indians living within a state, outside a reservation, may enjoy by virtue of this relationship to the national government a position of special privilege and protection, in certain respects, not enjoyed by other citizens of the state.

None of these cases overruled the *Heff* decision relative to the rights and obligations of an Indian upon becoming a citizen of a state. These authorities do not say that the conferring of citizenship on an Indian is an empty right, that he is not entitled to all the privileges and immunities enjoyed by a citizen under state government. Nor do they say an Indian citizen is not subject to its laws, upon acquiring its benefits.

In the case at bar, no legislation of Congress in behalf of its wards is in issue. In fact, the exercise of a state's inherent police power is beyond the jurisdiction of the federal government's interference. Concededly, it was within the power of Congress to withhold or even deny the granting of citizenship to the Indian. By conferring citizenship on the Indian, Congress could not compel the state to exempt him from the exercise of its police power which can only be validly exercised for the benefit of all citizens alike. Clearly, if a state discriminated against the Indian citizen in the exercise of its police power, the laws of the land would protect him and prevent such discrimination. (*Lawton v. Steele,* 152 U. S. 133.)

It is further observed that the federal enactment referred to in the *Hallowell* and *Nice* cases was in the interest of the Indians. Can it be argued less forcefully that the state, in enacting legislation looking to the conservation of its fisheries in the interest of its citizens, is doing so in any less degree for the benefit of the Indian citizen than for any other citizen? What other sovereignty than the state has jurisdiction to so legislate? The Federal government is powerless to invade a state's domain and regulate its fisheries. *Pollard v. Hagan,* 3 How. 212; *Smith v. Md.,* 18 How. 71; *Martin v. Waddell,* 16 Pet. 410; *McCready v. Va.,* 94 U. S. 391; *Manchester v. Mass.,* 139 U. S. 240; *Lawton v. Steele,* 152 U. S. 133; *Ill. v. Ill. Cent. R. R. Co.,* 146 U. S. 387; *Wharton v. Wise,* 153 U. S. 155; *Mann v. Tacoma Land Co.,* 153 U. S. 273; *Hardin v. Jordan,* 140 U. S. 371; *Shively v. Bowlby,* 152 U. S. 1; *The Abby Dodge,* 223 U. S. 166.

XI.

CONSERVATION OF OUR FAST DIMINISHING NATURAL RESOURCES IS ONE OF THE CHIEF CONCERNS OF ORGANIZED GOVERNMENT TODAY. IN THE DISCHARGE OF THIS IMPORTANT RESPONSIBILITY FOR AND ON BEHALF OF ITS PEOPLE, THE STATE OF WASHINGTON IS ACTING AS MUCH IN THE INTEREST OF THE INDIAN CITIZEN AS ANY OTHER, AND ITS OBLIGATION TOWARD HIM IS JUST AS GREAT, FOR THE INDIAN IS NOW AN INTEGRAL PART OF ITS CITIZENRY.

Circuit Judge Stevens, in his concurring opinion, in *Cerritos Gun Club v. Hall,* 96 Fed. (2d) 620, 630, described the need for conservation of our fast diminishing wild life in two poignant expressions, which we quote:

"Their preservation (referring to migratory birds of North America, subject to the Migratory Bird Treaty Act) is of great importance, and, therefore, a legitimate subject of governmental attention. * * * The nations have waited too long."

The State of Washington is here seeking to enforce adequate protective measures to prevent exhaustion of the salmon supply in the waters over which it has supreme jurisdiction. "After us the deluge" seems to be the maxim of many people in America today on the utilization of natural resources. Conservation seeks to insure to society the maximum benefit from the wise use of those resources. It is a timely field of action in the United States. As the nation comes of age and the limits of its resources and the character of its needs begin to appear more fully, the necessity for greater care in the utilization and renewal of the resources becomes impressive. It involves the welfare not only of the present generation but future generations whose material prosperity and social well-being depend so largely upon the possession and enjoyment of our natural endowments.

We respectfully invite the attention of this court to two public documents prepared by the United States Bureau of Fisheries in Washington, D. C. The first is Document 2000 (issued in September, 1935), I-81, entitled, "Conservation Work of the Bureau of Fisheries." We quote from page 8:

"A greater appreciation of the necessity for conserving our fisheries has undoubtedly been brought about by the serious depletion of some of the most important of them. *The sturgeon has all but disappeared from both coastal and inland waters; the salmon of the Atlantic Coast have been entirely exterminated in many streams, and in others only a small remnant of the former runs remains; in certain streams on the Pacific Coast the*

salmon are much reduced; the halibut on both coasts have been distinctly reduced in numbers, unquestionably as a result of overfishing; the shad and mullet of the east coast and the whitefishes and related forms of the Great Lakes have been affected, and the production of oysters has markedly declined.

" * * * Except in the Territory of Alaska and with respect to the taking of sponges in the extra territorial waters of Florida, *the Bureau of Fisheries is without power to regulate fishing, for under the Federal form of government Congress exercises only such powers as are delegated under the Constitution and complete jurisdiction of the fisheries has remained in the hands of the individual states.* * * * ." (Italics ours.)

The second is Fisheries Document No. 1092, entitled, "Pacific Coast Salmon Fisheries." We quote from page 410:

"The most valuable commercial fisheries in the world, excepting only the oyster and herring fisheries, are those supported by the salmons. Of these the most important by far are the salmon fisheries of the Pacific coast of North America, where California, Oregon, Washington, and Alaska, including also British Columbia, possess industries representing millions of dollars of investment and millions of output annually."

For whom is the fast diminishing supply being conserved by the State of Washington through the valid exercise of its inherent police powers? Only for the white man and not for the red man? Clearly not, for the Indian is now a full-fledged citizen, who can assert any of the rights and privileges of citizenship claimed by the white man. Can the Indian citizen be allowed special privileges which are as detrimental to him in the end as they are to his fellow white citizen? In fact, through the exercise of his voting privilege, the Indian as a citizen of the state, helped to place on the statute books these protective measures, from which he is now asking freedom from re-

straint to enjoy the very fruits of their objective, while his fellow citizen is amenable thereto.

To hamper the state in the exercise of its police power in this regard by allowing the Indian citizen to escape the reasonable regulatory measures designed to maintain the supply of its fisheries would be merely to thwart the state in coping with what is recognized today as one of its greatest problems. Who would question the wisdom and right of the Federal government to erect the huge power dams as national defense measures and to give civilization as now constituted the manifold benefits to be derived from the development of hydroelectric energy? These dams are threatening the continued existence of a great natural resource, our fish, in which the Indian has a vital interest. In fact, the guardian itself is responsible for gradually destroying the ancient fishing sites of its wards along the Columbia River. The state is waging a militant conservation warfare, in the face of almost insurmountable obstacles, to prevent the ever-increasing diminution, indeed th complete extinction, of the salmon fisheries, which once made the Northwest a "happy hunting and fishing ground."

The government's interest as guardian of the Indian wards, and the state's interest in behalf of all its citizens are not, or should not be, at variance. Indeed, it should be as much the concern of the guardian national government in behalf of its Indian wards, to see that the fisheries of the commonwealth are not exhausted by uncontrolled fishing methods as it is the concern of the State of Washington. Commercial salmon fishing is here involved. If the government's wards must depend upon monetary return from commercial fishing for a livelihood,

and this cannot be accomplished by the Indians through fishing according to reasonable state regulations, using the same types of gear and given the same fishing privileges accorded the ordinary citizen, then it is in the interest of the Indian, and in the interest of the welfare of the state and nation for the guardian to give the Indians an outright subsidy. Money can be replenished through coining; fish cannot be replaced once the fish themselves are exterminated.

CONCLUSION

Upon its face, this case perhaps does not appear to be of great importance. Viewed superficially and from a sentimental standpoint, it may seem that the State of Washington is not in an equitable position when it seeks to collect license fees from the Yakima Indians who are catching salmon for a livelihood. This is negatived by the benevolent acts of the Washington State Legislature which has enacted legislation permitting the Indian to fish at any time, without a license, for the consumption of himself and family in any of the salt waters bordering any Indian reservation or within one-half mile thereof, or fish with set net in any river within five miles of the borders of an Indian reservation (Chapter 31, Session Laws of the State of Washington, 1915). At the 1939 session of the legislature (Chapter 210, Laws of 1939), special fishing privileges were granted the Sokulk Band of Indians who have no reservation and are nomads, to take fish for personal use in designated fishing areas.

The case, however, is of far greater importance than disclosed by the record. This particular treaty provision is common to all the Indian treaties in the state so far

as we are able to ascertain. The net result is that these treaties, taken in concert, cover practically every *usual and accustomed place of fishing in the State of Washington.* Four Federal injunction suits are now pending in Federal District Courts in Washington to restrain the state fisheries officials from interfering with Indian commercial fishing exploitations outside the reservations. Others are being held in abeyance pending the outcome of the case at bar.

As a matter of public record, the 1930 government census showed 11,253 Indians in the State of Washington, which was an increase of 2,192 over the 1920 census. An additional 1,543 Indians were listed in 1930 as residents of Oregon, but sharing special privileges in fishing on the Columbia River. The official 1940 census figures are not yet compiled. According to the best available figures furnished by Indian agents, in 1938 there were 13,644 enrolled Indians living on reservations throughout the state, with an additional 500 (approximately) who were not enrolled in any agency.

Commercial fishing has developed upon a scale not even contemplated when the treaties were made. New and improved methods of taking fish by mechanical appliances and in enormous quantities have been perfected. The conservation of this valuable food supply has become a matter of supreme importance to the public welfare as is demonstrated by the session laws of each legislature. Many of the Indian tribes now make a business of fishing commercially. The commercial catch records of the state department of fisheries disclose that Indian fishermen take a substantial share of the food fish harvest annually. Many of the Indian fishermen operate

the most modern gear devised by the ingenuity of the white man. If the courts hold that the Indian citizens may fish unrestricted and free from control, then it must be deduced that no limitations can be placed upon the methods by which they fish.

We must not overlook the fact that the Indian citizen has grown into full stature of citizenship, and is as much a part of the body politic as any other citizen. As such, his interest in police measures adopted for the common good of all are undistinguishable. The corollary follows that the state's interest in the welfare of its Indian citizens is as great as that of any other. The proposition is tersely summarized in *Cawsey v. Brickey,* 82 Wash. 653, at page 657:

" * * * Since the title to game is in the state for the common good, the state's right to control, regulate or prohibit the taking of game wheresoever found and on whosesoever land is an inherent incident of the police power of the state. Tiedeman's Limitations of Police Power, Sec. 121f. It may be exercised *ad libitum* so long as the regulation or prohibition bears equally on all persons similarly situated with reference to the subject-matter and purpose to be served by the regulation. *Portland Fish Co. v. Benson,* 56 Ore. 147, 108 Pac. 122."

Regardless of the relative importance or nonimportance of the case, as stressed by both the appellants and appellees, the sole issue is the extent of the police power of the State of Washington. We respectfully submit, as a matter of law, that the Stevens Treaty of 1855 vouchsafed to the Makah Tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there *to fish in common with all citizens of the United States;* that the Enabling Act admitted

Washington into the Union invested with all the powers inherent to a sovereign state, including the right to regulate its internal affairs for the welfare of its citizens; that, accordingly, the fishing right granted by the treaty is subject to the paramount and superior right of the state under the exercise of its sovereign police power to regulate the taking of fish from the waters within its jurisdiction; that Congress in 1924 granted the Indian full citizenship, and the Indian citizen can now fish in common and on a parity with the citizens of this commonwealth; and that therefore the judgment of the District Court should be reversed and the permanent injunction dissolved.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

T. H. LITTLE,
Assistant Attorney General of the State of Washington,
Counsel for Appellants.